83130-1
NO. 83606-0

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

DAROLD RAY STENSON,

Petitioner.

PETITIONER'S BRIEF ADDRESSING REFERENCE COURT'S FINDINGS OF JANUARY 20, 2011

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I. INTRODUCTION

On January 20, 2011, Clallam County Superior Court Judge Kenneth Williams found that the state had suppressed important exculpatory evidence that would have rendered inadmissible one of the most damaging items of evidence against Darold Stenson: test results showing that traces of gunshot residue had been found in Stenson's right pants pocket. The state used this evidence to argue that the hand of the murderer and/or the murder weapon had entered that pocket. Suppressed evidence of contamination convinced Judge Williams that the evidence never should have been presented to the jury. Based on those findings, Stenson's conviction and sentence should be set aside as being obtained in violation of due process.

II. PROCEDURAL STATEMENT

The case against Darold Stenson in the double homicide of his wife, Denise, and his business associate, Frank Hoerner, was largely circumstantial. There were no eyewitnesses to the crime. Stenson called 911 to report the shootings and told the police he had found his wounded wife in bed upstairs and Hoerner's body on the floor downstairs.

Two pieces of forensic evidence were offered to prove that only Stenson could have committed the homicides, and both involved trace evidence found on his jeans: gunshot residue (GSR) detected in the right pants pocket and traces of Hoerner's blood on both pants legs. According to the state, the GSR proved that Stenson's hand had been in a "shooting

environment," and the bloodstains showed that Hoerner's blood must have dripped or been cast onto the jeans from Hoerner's body before it reached its final resting place on the floor. The state argued the blood spatter proved Stenson's guilt because it was inconsistent with Stenson's account.

In addition to the forensic evidence, the state relied on evidence of motive, opportunity, and demeanor. The state's theory was that Stenson had committed the murders in order to collect insurance money on his wife and to extricate himself from a failing business venture.

In 2008, the FBI notified the state (which then notified the defense) that one of its testifying experts, FBI Agent Roger Peele, might have provided flawed testimony on the subject of comparative bullet lead analysis (CBLA). Ref. Hg. 3/15/10 VRP: 27-30; Ref. Hg. Ex. 95. This disclosure prompted the defense to investigate whether such testimony affected Stenson's trial. As it turned out, Peele had also been the state's GSR expert witness. After learning of Peele's potentially flawed CBLA testimony, the defense requested all records of CBLA and GSR testing, and also sought other records of trace evidence analysis, including records from the state's two bloodstain experts, Rod Englert (who did not testify) and Michael Grubb (who did). 3/15/10 VRP: 40-42.

The records turned over in late 2008 and early 2009 included significant items never previously provided to the defense. FBI laboratory bench notes (Ref. Hg. Ex. 7) revealed that only two to four microscopic

particles of GSR were found in Stenson's right pants pocket and that the actual testing had been performed, not by Peele, but by a lab trainee. Englert's materials included photographs (Ref. Hg. Ex. 67), taken a week before testing of the pockets for GSR, showing the lead detective, Monty Martin, ungloved, wearing Stenson's pants with the pockets turned inside out. (Ex. A attached). Another Englert photo showed the bloodstained left leg of Stenson's pants prior to the removal of any stains for testing. Grubb's notes indicated that the pants showed evidence of having been folded over when the blood was still wet, thereby altering the pattern and creating a foldover shadow stain. *See* Ex. 4a to Petitioner's Memorandum of Law Regarding Materiality Analysis Under *Brady v. Maryland* ("*Brady* Memo").

Following these discoveries, Stenson filed a post-conviction challenge claiming the state had suppressed exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). Judge Williams conducted a two-week evidentiary hearing in March 2010 that focused on the photos of Martin wearing Stenson's pants and the FBI bench notes concerning GSR.

Following the reference hearing, Judge Williams found that:

> * Stenson and his lawyers were duly diligent in discovering the new GSR evidence. Reference Hearing Findings and Conclusions (RHFC) at ¶¶ 33, 46, 50.
>
> * Photographs of Martin wearing Stenson's pants shortly before the GSR testing, without gloves and with the pockets turned out, showed that the pants had been so mishandled as to completely compromise

the forensic value of the GSR results. RHFC at ¶ 36.

* Had the court been aware of this mishandling, it would have excluded the GSR evidence from the trial. RHFC at ¶ 36.

* Given the importance of the GSR evidence, it was hard see how its admission could be considered harmless. RHFC at ¶ 35.

* Circumstantial evidence of motive, demeanor, and opportunity were not conclusive of guilt. RHFC at ¶¶ 37-39.

* The forensic trace evidence – GSR and blood stain evidence – constituted a qualitatively different category of evidence and was the most important evidence of guilt. RHFC at ¶¶ 39, 41.

* Although Stenson's post-conviction challenge succeeded in neutralizing the GSR evidence, it did not impeach the blood spatter evidence. That evidence remained essentially unrebutted. *Id.*

* Under Washington's newly-discovered evidence rule, Stenson could not show that the new evidence probably would have resulted in an acquittal. RHFC at ¶ 42. The court declined to apply the *Brady* standard. ¶ 41.

Stenson then argued to this Court that Judge Williams had left unresolved a key legal issue – whether the new evidence was material enough to warrant a new trial under *Brady* and its progeny. In November 2010, this Court remanded the case for a ruling on the *Brady* issue.

On remand, Stenson argued that the *Brady* evidence entitled him to a new trial for at least three reasons: (1) the evidence had so compromised one of the most important pieces of evidence that it was subject to outright exclusion, and that fact alone was sufficient to undermine confidence in the verdict; (2) revelations of evidence mishandling by the lead detective and misleading argument by the prosecutor on the GSR issue would have cast

doubt on the integrity of the state's entire investigation; and (3) exposure of mishandling of the pants regarding GSR would have led to exposure of weaknesses in the blood stain evidence. *Brady* Memo Points V-VII.

Stenson offered several exhibits to show how the *Brady* evidence would have led, and did in fact lead, to exposure of the weaknesses in the blood stain evidence: (1) handwritten bench notes from Grubb, in which Grubb noted the presence of a shadow blood stain on the right leg of the jeans, indicating that the jeans had been folded over when they were still wet; (2) a photograph taken by Englert in 1994 showing the left leg of Stenson's jeans with all of the blood stains intact, before any stains had been cut out for laboratory examination; and (3) a declaration of forensic specialist Kay Sweeney opining that the stains on the left leg were likely contact stains rather than airborne droplet stains and affirming Grubb's opinion that the photographs of the pants showed clear evidence of a fold-over stain pattern. *See* Exs. 1-4 attached to *Brady* Memo (copy of Sweeney Declaration also attached hereto as Ex. B).

Following supplemental briefing and oral argument, Judge Williams made the following findings and conclusions:

> *The Englert photos and FBI notes constituted newly discovered evidence. Jan. 20, 2011 Opinion (Op.) at 7.
>
> *The state suppressed the Englert photos, FBI notes, and the fact of Martin's mishandling of the pants. *Id.* at 7-8.
>
> *Martin was present at trial when Peele testified that there

would be a concern about contamination if anything had gone into the pockets before the GSR testing. That this had happened was information available to Martin and should have been disclosed. *Id.* at 7-8.

*The FBI bench notes were the subject of a specific request by the defense, a specific order by the court, and a specific promise by the state, but were not provided. *Id.* at 8.

*The GSR evidence was inculpatory. The suppressed evidence would have likely resulted in the exclusion of the GSR testimony as unreliable. *Id.* at 12.

*The Englert photos could have impeached not only the GSR results, but also the state's argument that it carefully handled all of the evidence presented at trial. *Id.* at 6.

*Peele implied at trial that he had conducted the GSR tests himself and the results were admitted based on his qualifications. The defense could not challenge the credentials of the actual examiner, which could impeach the credibility of the results and undermine the state's argument as to its witnesses' professionalism. *Id.* at 6-7.

*The suppressed evidence could have been used by the defense to attack the credibility and professionalism of the state's investigators and other witnesses, touted by the state in its closing argument. *Id.* at 12-14.

*Unrebutted and unimpeached testimony about the blood evidence on Stenson's jeans was the most compelling evidence at trial. The state's failure to turn over Grubb's bench notes indicating the presence of a foldover stain may well constitute suppression under *Brady*. *Id.* at 4-5, 14.

*The remand order was a narrow one and did not allow for consideration of Grubb's notes. The court was unable to conduct a complete *Brady* analysis because it could not assess the impeachment value or materiality of the Grubb notes. *Id.* at 4-5; 14-15.

*Arguments and evidence presented at the guilt phase can have a significant effect on the jury's choice of sentence, and

> it was "exceedingly difficult" to assess how a piece of forensic evidence "may have actually impacted a particular juror." *Id.* at 16.

III. SUMMARY OF THE ARGUMENT

Judge Williams correctly found that Stenson and his counsel had acted with due diligence in discovering the Englert photos and FBI notes regarding GSR, and that the state suppressed this evidence.

In assessing the materiality of the evidence on the verdict, however, Judge Williams failed to appreciate the significance of his own findings that the GSR test results were one of the most important pieces of evidence in the case and would have been excluded but for the state's suppression of the evidence. Given these findings, Stenson is entitled to a new trial even if one considers the effect of the suppressed evidence only upon the GSR evidence.

But the materiality analysis does not end with the exclusion of the GSR evidence. Rather, a court must also consider how competent defense counsel would have used the disclosure of exculpatory evidence at trial, both in and out of court. Beyond the total discrediting of the GSR results, the integrity and quality of the state's entire investigation, evidence handling procedures, and case presentation would be called into question.

Indeed, evidence of mishandling of the pants led Stenson's counsel to consult with forensic expert Sweeney in 2009 to review the blood stain evidence, both old and new, in light of the contamination issues. Sweeney agreed that the photos showed evidence of a shadow stain on the right leg,

indicating that the pants had been folded over when still wet, and further opined that the left leg stains were not drip stains, but were instead much more likely contact transfer stains. Sweeney Declaration, Ex. B.

Despite the significance of this information, learned as a result of the uncovering of the previously suppressed evidence, Judge Williams declined to consider arguments concerning blood stain issues at this time because they raised factual questions not yet subjected to any fact-finding hearing. This was error. Stenson's proffer of the Sweeney declaration (previously submitted in 2009) was not a request for the reference court to decide which forensic expert was "right." Rather, it was an attempt to show how the affidavit was itself a product of the GSR inquiry, and how it exposed an area of legitimate debate between forensic experts on a crucial trial issue. A jury would decide which testimony was more persuasive. But instead of hearing unrebutted expert testimony, the jury would have the benefit of a credible defense expert offering a dissenting opinion.

Gunshot residue and blood stain patterns were the two most important items of evidence. The suppressed evidence would have neutralized the one and significantly challenged the other. On this record, Stenson has earned a new trial under *Brady*. However, should this Court agree with the reference court that potentially decisive factual issues concerning blood spatter evidence remain to be resolved, then Stenson asks the Court to remand the case once again for further hearings.

Stenson is also entitled to a new trial under the more liberal standard of *Napue v. Illinois*, based upon the state's knowing presentation of misleading testimony and argument.

Finally, at a minimum, the Court should vacate Stenson's death sentence because there is a reasonable probability that the suppressed evidence would have given at least one juror enough pause about Stenson's guilt so as to change the juror's vote for a sentence of death.

IV. ARGUMENT

A. Standards of Review

A trial court's findings of fact from a reference hearing are reviewed for substantial evidence and are binding upon the appellate court "when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premises are true." *In re Pers. Restraint Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999), *amended*, 1999 Wash. LEXIS 448 (June 30, 1999). In contrast, a trial court's conclusions of law and mixed questions of fact and law following a reference hearing are reviewed *de novo*. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873-74, 16 P.3d 601 (2001).

Judge Williams' decision that the FBI file, Englert photographs, and the information they contained, were suppressed – whether in good or bad faith – is a factual finding reviewed only for "substantial evidence." *State v.*

Martinez, 121 Wn. App. 21, 30-31, 86 P.3d 1210 (2004), *amended*, 2004 Wash. App. LEXIS 668 (April 24, 2004).

Judge Williams' decision that the suppressed evidence was not "material" under *Brady* is a conclusion of law reviewed *de novo*. *In re Pers. Restraint of Bradford*, 140 Wn. App. 124, 130, 165 P.3d 31 (2007). *See also United States v. Price*, 566 F.3d 900, 907 n.6 (9th Cir. 2009).

B. The Suppressed Evidence Undermines Confidence In the Guilt Verdict

1. The Reference Court Made Critical Findings in Stenson's Favor Regarding Due Diligence, Suppression, and Materiality

To win a new trial under *Brady*, a defendant must establish that the prosecution suppressed evidence, that the evidence was favorable to the accused, and that it caused prejudice by undermining confidence in the verdict. *Strickler v. Greene*, 527 U.S. 2, 63, 119 S. Ct. 1936, 144 L.Ed.2d 286 (1999). Judge Williams' two decisions contain significant findings and conclusions that are largely favorable to Mr. Stenson. Taken together, they favor granting rather than denying relief.

Focusing exclusively on the GSR evidence, the court made these critical findings in favor of Mr. Stenson:

*The state suppressed the FBI notes and Englert photos (Op. at 7-8);

*The suppressed evidence was exculpatory or impeaching (Op. at 12);

*The suppressed evidence rendered the GSR test results – among the most important evidence against Stenson – unreliable and subject to outright exclusion (Op. at 12);

*It was difficult for the trial judge to see how the erroneous admission of the GSR evidence could be considered harmless. RHFC ¶ 35.

Substantial evidence supports the trial court's findings that the state suppressed the evidence and that Stenson and his counsel exercised due diligence.[1] Accordingly, Stenson devotes the remainder of this brief to the question of the materiality of the suppressed evidence.

When a court finds that one of the two most inculpatory items of evidence was erroneously admitted at trial, it is difficult to see how confidence in the verdict could not be undermined or how a defendant could still have received a fair trial, especially in a capital case. Given the importance of the GSR evidence, the use made of it by the state, and the fact that only a single juror need be swayed to change a trial result, Darold Stenson deserves a new trial even if the *Brady* evidence did nothing more than impeach the GSR test results.[2]

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[1] Attached as Exhibit C is a copy of Petitioner's Reply Re: Motion for Stay of Execution, filed May 28, 2010. It contains extensive and specific record citations supporting Judge Williams' findings concerning suppression, due diligence, and materiality.

[2] Even a single item of evidence may be important enough to merit a new trial. *See Ballinger v. Kerby*, 3 F.3d 1371 (10th Cir. 1993) (granting new trial based on nondisclosure of a single photograph that would have impeached an important state witness); *Benn v. Lambert*, 283 F.3d 1040, 1059 (9th Cir. 2002) (suppression of arson report alone merited reversal).

As set forth below, Judge Williams erred in concluding that the suppressed evidence was not material.

2. The Englert Photos and FBI Bench Notes Are Material Enough to Warrant a New Trial Even if Limited Solely to Their Effect Upon the Gunshot Residue Test Results

In conducting his analysis under *Brady*, Judge Williams accurately expounded *Brady's* standard of materiality as set forth by the United States Supreme Court and this Court. Op. at 9-11. In deciding whether there exists a reasonable probability of a different result, Judge Williams recognized a court must decide whether the defendant received a fair trial, "understood as a trial resulting in a verdict worthy of confidence." Op. at 9, citing *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995), and *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). He also recognized that the materiality test is not a sufficiency of the evidence test and that any suppressed evidence must be "considered collectively, not item by item." Op. at 10, citing *Kyles*, 514 U.S. at 436. And, he recognized that the effect of the suppressed evidence must be assessed "in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the Defense in the trial would have taken had the Defense not been misled by the Prosecutor's incomplete response." Op. at 11, citing *Bagley*, 473 U.S. at 785.

However, in ruling that the effect of the *Brady* evidence solely upon the GSR test results was insufficient to satisfy *Brady's* materiality standard, Judge Williams ignored the clear implications of his own factual findings and the case law he relied upon. He himself had pointed out that none of the circumstantial evidence was conclusive of guilt. His earlier opinion had carefully distinguished between two categories of evidence: the circumstantial evidence (motive, demeanor, and opportunity) versus the forensic trace evidence (GSR and blood stains) tying Stenson directly to the homicides. RHFC at ¶¶ 35, 38.

That categorical division reflected the stark difference in inculpatory value between the forensic trace evidence and the circumstantial evidence. Motive, demeanor, and opportunity were inherently ambiguous. Gunshot residue and blood stains on the defendant's clothing were a different matter. They raised two damning inferences: 1) that the trigger hand on the murder weapon (if not the gun itself) had been in Stenson's right pocket and 2) that Hoerner's blood on Stenson's pants must have been deposited before Hoerner's body was on the ground, as Stenson claimed to have found him.

Judge Williams also noted that the prosecution had capitalized on the GSR inferences in closing and recognized that materiality may be assessed by the use made of evidence by the state in closing. Op. at 14, citing *Strickler*, 527 U.S. at 290. As the court correctly pointed out, the prosecutor mentioned GSR twice, first (briefly) in his initial closing statement, and then much more

forcefully in his rebuttal. He did so in order to discredit and ridicule defense arguments and also to buttress the competence of his investigators. Op. at 14.

Despite finding that GSR and blood spatter were the most important items of evidence and that the *Brady* disclosures rendered GSR so forensically useless as to warrant its outright exclusion, despite recognizing the state's reliance on the evidence, and despite his observation that it would be difficult to imagine how the erroneous admission of GSR results could ever be considered harmless, Judge Williams remained tied to his belief that he could not order a new trial so long as the blood stain evidence was unimpeached.

This position misconceives the teachings of *Kyles, Bagley, Strickler*, and other *Brady* cases. It essentially reinstates a sufficiency of the evidence test by canvassing the record and asking whether sufficient evidence remains for conviction. That methodology has been soundly rejected by the Supreme Court. *See, e.g., Kyles*, 514 U.S. at 434-35. The test is whether confidence in the verdict has been undermined and whether the defendant can be confidently said to have received a fair trial. *Id.*

3. The Englert Photos and the FBI Bench Notes – When Considered for their Effect on Both the GSR and the General Integrity of the State's Investigation – Warrant a New Trial

In assessing the materiality of suppressed evidence, a court must consider 1) how competent defense counsel could use the newly discovered

exculpatory evidence at trial, and 2) what other relevant information the evidence would have led to. *See Kyles,* 514 U.S. at 445-46, *Paradis v. Arave*, 240 F.3d 1169, 1180 (9th Cir. 2001); *Silva v. Brown*, 416 F.3d 980, 988 (9th Cir. 2005).

Although Stenson agrees with the reference court that the new evidence rendered the GSR results forensically useless and subject to exclusion, it would be a mistake to simply imagine the trial with the results excluded. Such an approach would not only run afoul of Supreme Court instruction, but would also rob the defense of all favorable inferences naturally flowing from the exculpatory evidence. It would amount to a sufficiency of the evidence test and would have the perverse effect of sanitizing the record by excluding not only the GSR results, but all evidence of the state's errors as well – in handling exhibits, questioning witnesses, and making arguments to the jury – which the *Brady* evidence brought to light.

These secondary effects of the withheld evidence are critical to the materiality determination. *See, e..g, Kyles*, 514 U.S. at 446 n.15 (recognizing that jury would have counted "the sloppiness of the investigation against the probative force of the State's investigation"); *Benn,* 283 F.3d at 1056 (recognizing *Brady* extends to evidence reflecting poorly on witness's competency and credibility).

Rather than simply erasing GSR from the record, the materiality of the suppressed evidence should be assessed by imagining the trial as it actually

occurred, with the (now discredited) GSR evidence, and with all of the likely consequences flowing from the withheld evidence. Such a trial would allow Stenson to do the following:

To rebut claims that the investigation was meticulous, impeccable, and highly professional[3], Stenson could point to the haphazard and cavalier way in which critical pieces of evidence were treated. *See, e.g.*, 3/17/10 VRP: 32, 65 (Martin trying on pants). He could show that the lead investigator was biased[4], or suffered from memory problems[5]. He could show that at least one state's expert (Peele) testified misleadingly, implying that he had personally conducted forensic tests when in fact they had been done by a trainee assistant. 3/16/10 VRP: 159. He could argue that the state had knowingly proffered worthless forensic evidence and then touted it in closing as highly probative of guilt.8/9/94 VRP: 1778-09; Ref. Hg. Ex. 90. The mishandling of the pants would serve as a prime example of why the state's evidence, witnesses, and arguments should all be viewed with extreme skepticism. *See, e.g., Kyles,* 514 U.S. at 446.

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[3] 7/19/94 VRP: 334-42 (Martin's testimony about experience and lead role at crime scene); 7/25/94 VRP: 661-64 (Martin attesting to chain of custody and unchanged condition of pants).

[4] 3/3/10 VRP: 93-95, 100-01; RHFC ¶ 45 (failure of Martin to disclose contamination of pants).

[5] Ref. Hg. Ex. 98 (Martin's 2009 sworn statement that he did wear gloves while handling pants).

Given the opportunity to impeach not only the useless GSR evidence but the state's entire investigation, competent defense counsel would have been able to undermine confidence in the state's case against Stenson. By the end of the trial, one of the key pieces of inculpatory evidence would have been completely neutralized, and the rest of the state's case would have appeared much less solid than advertised.

4. The Englert Photos and the FBI Notes Are Also Material Because They Would Have Led to a Vigorous Attack on the Bloodstain Evidence

Judge Williams, even while focusing narrowly on the GSR results, acknowledged that a proper *Brady* analysis requires a court to consider more than just the direct uses of newly discovered evidence. A court must also consider "what admissible evidence competent counsel may have been able to discover if the suppressed evidence had been timely disclosed." Op. at 5, citing *Paradis*, *supra*.

The reference court's unwillingness to factor the Sweeney affidavit, photograph of the intact pants, and/or Grubb notes into the *Brady* analysis stemmed from its belief that any such issues could only be considered after additional evidentiary hearings. But Stenson offered these exhibits to show how the GSR revelations had led to new arguments and evidence with which to attack the blood stain testimony. *Brady* Memo Point VII. Discovery of Martin's contamination of the pants caused defense counsel to conduct a

broad inquiry into the more general issue of trace evidence corruption and trace evidence testimony related to the pants. 3/15/10 VRP: 40-42.

The decision to consult with a forensic blood expert in light of the GSR revelations yielded several insights that could have been of great benefit at a trial. One pertained to the state's mishandling of the pants. Improper collection and storage of the pants, leading to alteration of the stain pattern, could have been used to generally impeach the state's professionalism in handling evidence. Even more important was the fact that a favorable expert opinion on the cause of some key blood stains on the left leg had become available. Sweeney Declaration, Ex. B.

The assertions in Sweeney's declaration, offered in support of the argument outlined above, did not require a hearing before being factored into the *Brady* analysis. Judge Williams apparently believed a hearing would be necessary to establish, for example, whether the pants had been folded over by Martin or by Stenson himself when he handed over the pants to investigators. Op. at 5. The answer to that question, however, would not have changed petitioner's argument. Under either scenario, it was the state investigators who were the professionals responsible for making sure that evidence was gathered and stored so as to preserve the integrity of any trace evidence. The fact of the foldover stain is not in dispute. Neither is the failure of the state's expert to refer to it at trial. Certainly, the forensic significance of the foldover stain would remain in question. Yet, even if it were found to

have limited forensic significance, it would stand as another example of the cavalier approach to evidence handling displayed by state investigators.

Sweeney's more significant conclusion, however, was that the left leg stains were transfer and not airborne spatter stains. The issue was important at trial because the state had stressed that there was no explanation for how spatter stains could have ended up on Stenson's pants if he had truly discovered Hoerner already lying dead on the floor. Grubb had opined at trial that the right leg stains could be either dripped or contact stains. 8/2/94 VRP: 1381-84;1402-03. Sweeney's opinion about the left leg would thus raise the significant possibility that none of the stains were due to airborne spatter.

As Judge Williams himself noted, the state's blood stain evidence was essentially unrebutted. RHFC ¶¶ 39,41; Op. at 4-5. The defense called no expert as a counterweight to the state's expert. Here was an example of how the *Brady* evidence would have changed that imbalance and leveled the playing field.

Stenson reiterates here the position he took at the January 3, 2011 hearing: issues relating to blood stain evidence could be considered without further hearings; however, if the court believed otherwise, Stenson was and is prepared to prove any unresolved factual issue the court believed necessary to its ruling. See Oral Argument VRP: 1/3/11 at 34; 52.

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C. Stenson Is Also Entitled to a New Trial Under the More Liberal Materiality Standard of *Napue v. Illinois*

In addition to his *Brady* claim, Stenson has raised a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), asserting that the state committed intentional acts of misconduct at trial by permitting false and misleading evidence and argument to be presented to the jury. When the prosecution presents or fails to correct false evidence in violation of *Napue,* the false testimony is deemed material if "there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Hamilton v. Ayers*, 583 F.3d 1100, 1110 (9th Cir. 2009).

Trial prosecutor David Bruneau assured the jury that the gunshot residue evidence pointed conclusively toward Stenson's guilt. He told them that defense suggestions of contamination of the sample were nothing more than desperate and groundless speculation, and argued that the GSR proved Stenson's hand had been in a shooting environment. He made these remarks during his rebuttal summation, when the defense had no opportunity to respond. VRP 8/9/94: 1778-79; Ref. Hg. Ex. 90.

The reference hearing showed not only that the GSR evidence was worthless, but that the prosecutor knew it. At the hearing, Bruneau admitted his familiarity with GSR evidence but said he attached little importance to it. Because GSR evidence was so inherently ambiguous, "might be" evidence would be a more accurate term for it. "They're [GSR results] never going to

say Mr. X fired a gun." VRP 3/16/10: 142. As the hearing showed, the prosecutor not only failed to disclose evidence, but affirmatively misled the jury about evidence whose value he recognized as highly dubious.

"[T]he district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue*, 360 U.S. at 269-70; *see also State v. Reeder*, 46 Wn.2d 888, 892 (1955) (prosecutor is a quasi-judicial officer whose duty is to see that a defendant gets a fair trial; he has no right to mislead a jury in summation).

The prosecutor carefully questioned his GSR expert to elicit the testimony he needed for his argument – testimony described by forensic expert Janine Arvizu as highly misleading. RHFC ¶ 17. To dispel any question about the validity of the test, Bruneau asked his expert whether the pockets could have been contaminated. No, said the expert, so long as they had not been disturbed before testing. RHFC ¶¶10; 13. During this testimony the lead detective sat silently at counsel table. RHFC ¶ 14. He knew that a week before the pockets were tested he had tried on the pants and turned the pockets inside out, without protective gloves, and that he was photographed doing so by a state witness. No one told the testifying GSR expert of this episode and no one bothered to correct his testimony.

The prosecution made deliberately deceptive statements to the jury about the meaning of crucial GSR evidence and failed to correct testimony it knew to be misleading and untrue. Such acts require reversal if there is any

reasonable likelihood that the false testimony could have affected the judgment of the jury, a more lenient standard than that required under *Brady*. *Agurs*, 427 U.S. at 103; *Napue*, 360 U.S. at 271.

D. The Exculpatory Value of the *Brady* Evidence Also Entitles Darold Stenson to a New Penalty Phase Hearing, Regardless of Its Effect on the Verdict

1. The Court Must Consider Whether the Suppressed Evidence Was Material to the Death Sentence

Weaknesses in guilt-phase evidence are relevant to a jury's assessment of lingering doubt. Accordingly, in death penalty cases, courts must consider the materiality of suppressed *Brady* evidence on the penalty phase as well as the guilt phase. *See Smith v. Black*, 904 F.2d 950, 968-69 (5th Cir. 1990), *vacated on other grounds*, 503 U.S. 930 (1992) (recognizing that suppressed evidence of guilt may be material to punishment given capital jury's potential consideration of residual doubt, even though trial judge rejected residual doubt instruction); *United States v. Davis*, 132 F. Supp.2d 455, 460-62 (E.D. La. 2001). *See also Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (petitioner entitled to certificate of appealability to raise *Brady* claim attacking result of penalty phase in capital case due to suppression of evidence impeaching guilt phase and penalty phase witnesses).[6]

[6] *Brady* itself was a capital case. Both Brady and a codefendant were convicted of murder and sentenced to death. The state had suppressed evidence that Brady's codefendant had confessed to doing the actual killing. The state court ruled that this would not have affected the murder conviction but could have affected the sentence

Courts consistently recognize that weaknesses in guilt phase evidence can cause jurors to vote against the death penalty and that the tactic of arguing "lingering doubt" during the penalty phase of a capital case is an effective defense technique. *See, e.g., Strickler*, 527 U.S. 263, 305 (Souter, J., concurring in part and dissenting in part); *Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Williams v. Woodford*, 384 F.3d 567, 624 (9th Cir. 2004); *Parker v. Sec'y for the Dep't of Corr.*, 331 F.3d 764, 787-88 (11th Cir. 2003); *United States v. Chandler*, 218 F.3d 1305, 1320, n.28 (11th Cir. 2000); *Hannon v. State*, 941 So.2d 1109, 1130 (Fla. 2006); *Comm. v. Meadows*, 567 Pa. 344, 787 A.2d 312 (Pa. 2001); *State v. Watson*, 61 Ohio St. 3d 1, 17, 572 N.E.2d 97 (1991).

Although a criminal defendant does not have a federal constitutional right to a jury instruction on residual doubt, *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the cases above recognize that defense counsel can nonetheless argue lingering doubt and that such arguments may be the most powerful.[7]

A capital jury in Washington cannot impose a death sentence unless the jurors unanimously agree, "[h]aving in mind the crime of which the

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and remanded for a new penalty hearing. The Supreme Court affirmed the state appellate court's decision to grant only penalty phase relief.

[7] It is irrelevant that there is no federal constitutional right to produce evidence of residual doubt at sentencing. *Oregon v. Guzek*, 546 U.S. 517, 126 S. Ct. 1226, 1231-32, 163 L. Ed. 2d 1112 (2006). The *Brady* evidence at issue here would have been presented during the guilt phase, when all evidence tending to cast doubt on guilt is admissible.

defendant has been found guilty" that "there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.06. The sentencing deliberation requires the jury to consider "the crime of which the defendant has been found guilty," and capital juries are accordingly instructed that all guilt phase evidence and exhibits remain before them as they reach their sentencing decision. The decision whether to impose death is not made in a vacuum, but is statutorily and practically tied to the inculpatory evidence introduced during the first phase of the trial. It necessarily follows that any exculpatory evidence wrongly excluded from the first phase must also be evaluated for its impact at sentencing, given that only one juror need be swayed to change the sentence.

Thus, as Judge Williams recognized, even though the suppressed evidence related to whether Mr. Stenson was guilty, "'the evidence and arguments presented during the guilt phase of a capital trial, will often have a significant effect on the juror's choice of sentence.'" Op. at 15, citing *Strickler*, 527 U.S. at 305.

2. The Suppressed Evidence Undermines Confidence in Mr. Stenson's Death Sentence

The suppressed evidence shows that the prosecution overstated the forensic evidence; over-credited the quality of its evidence collection; relied on an untrustworthy lead detective and evidence custodian; used the presence of GSR in the pants pocket to ridicule all of the defense claims; and tried to

turn a circumstantial case into a forensic science case. 8/9/94 VRP: 1778; Ref. Hg. Ex. 90.

In assessing the materiality of the withheld evidence on the penalty phase verdict, the Court must review the remaining evidence with "painstaking care," *Kyles*, 514 U.S. at 422, because a death penalty verdict is at issue. Moreover, as Judge Williams acknowledged, in Washington, "a reasonable probability of a different result need only amount to the possibility of a non-unanimous jury." Op. at 16, *citing Price*, 566 F.3d at 914.

If the Court is "in grave doubt about the likely effect of an error on the jury's verdict," meaning "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error," then the Court "should treat the error, not as if it were harmless, but as if it affected the verdict." Op. at 16, citing *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). [8]

Judge Williams candidly acknowledged that for him, "It is exceedingly difficult to know how a particular piece of forensic evidence may have actually impacted a particular juror." Op. at 16. He continued, "It is clear that some of the evidence used to convict the defendant, the GSR

[8] Judge Williams was correct to rely on *O'Neal*. When evaluating PRPs, this Court often looks to United States Supreme Court precedent concerning habeas corpus. *E.g., In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 950-52, 162 P.3d 413 (2007); *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 324, 823 P.2d 492 (1992).

evidence, was unfair. Some witnesses' credibility may have been able to be impeached." *Id.*

His mistake, given the difficulty of the decision for him and the strength of the defense arguments, was to err on the side of preserving the status quo. Applying the "painstaking care" standard of *Kyles*, 514 U.S. at 422, and the "equipoise" standard of *O'Neal*, 513 U.S. at 435, and understanding that there is, in Washington, "a reasonable probability of a different result" in the penalty phase if the defense shows only "the possibility of a non-unanimous jury," the result should be just the opposite. The suppressed evidence creates a "reasonable probability of a different result" in the penalty phase.

V. CONCLUSION

The Court should set aside Darold Stenson's conviction and order either a new trial or a new penalty phase hearing. Alternatively, the Court should remand the case for further evidentiary hearings on any unresolved factual issues relating to blood stain evidence.

DATED this 2nd day of March, 2011.

Peter J. Avenia, WSBA No. 20794

Sheryl Gordon McCloud, WSBA No. 16709

Counsel for Darold Stenson

CERTIFICATE OF SERVICE

I certify that on March 2, 2011, I served a copy of the above-noted document by e-mail to: Assistant Attorney General John J. Samson at johns@atg.wa.gov; Clallam County Prosecuting Attorney Deborah S. Kelly at dkelly@co.clallam.wa.us; and Special Deputy Prosecuting Attorney Pamela Loginsky at pamloginsky@waprosecutors.org.

DATED this 2nd day of March, 2011, at Seattle, Washington.

Barbara Hughes

EXHIBIT C

NO. 83606-0

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

DAROLD R. J. STENSON,

Petitioner.

REPLY RE: *MOTION FOR STAY OF EXECUTION*

Sheryl Gordon McCloud
710 Cherry St.
Seattle, WA 98104-1925
(206) 224-8777
Attorney for Petitioner
Darold R. J. Stenson

I. INTRODUCTION

The state seems to suggest that RAP 16.24 requires a petitioner to win his case on the merits, first, before obtaining a stay of execution. That is not what RAP 16.24 says. Instead, that Rule incorporates the requirements of RCW 10.73.100(1). That statute provides that a petitioner bringing a claim based on newly discovered evidence must show that he exercised reasonable diligence in discovering and presenting the claim. The reference hearing judge found that Mr. Stenson's new evidence was in fact new, and could not have been discovered earlier through due diligence. He did not rule on Mr. Stenson's legal claims under *Brady v. Maryland*[1] and *Napue v. Illinois*,[2] leaving it to this Court to rule on their merits.

A stay is appropriate for that purpose. Mr. Stenson can meet the constitutional standards of *Brady* and *Napue* for obtaining a new trial and asks this Court to set a briefing schedule to consider his claims.

In his Supplemental Brief on the Effect of the Reference Court's Findings and Conclusions, Mr. Stenson offered extensive argument on the requirements of RCW 10.73.100(1). That argument will not be repeated

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[1] *Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[2] *Napue*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

here.

The state's opposition to a stay of execution, however, contains a lengthy discussion of the reference hearing record in an effort to show that Judge Williams was wrong about his findings and conclusions. The state's version of the facts completely contradicts the reference court's findings, which were entered after an 8-day evidentiary hearing. Because the state has used its response to produce such a voluminous, but inaccurate, factual summary, without revealing the differences between its version and Judge Williams' version, we submit our own below. It shows that Judge Williams' Findings of Fact are based squarely on the evidence.

II. JUDGE WILLLIAMS' FACTUAL FINDINGS ARE FULLY SUPPORTED BY THE EVIDENCE

The state deals with the Superior Court's factual findings about timeliness and defense diligence by asserting: "Ultimately, Judge Williams dodged the question, stating that '[i]t is hard for this Court to second guess counsel's assessments and choice in the setting of priorities." Response, p. 8 (citing FF 55).

Unsupported criticisms of the Superior Court's findings and conclusions, however, cannot undo their binding effect. Indeed, "A reviewing court may not disturb *findings of fact* supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokeley*, 168

Wn.2d 627, 631, __ P.3d __, 2010 LEXIS 334 (2010) (citation omitted) (emphasis added). The Superior Court's factual findings on the discovery, diligence and timeliness points are completely supported by the record, as are its findings that the new evidence would have caused that court to exclude the GSR results at trial as the following summary shows.[3]

A. Sgt. Martin Contaminated the Stenson Pants in the Presence of State Witness Mr. Englert on April 14, 1994, and Took GSR "Dabs" From the Contaminated Pockets 6 Days Later

On April 14, 1994, Sgt. Martin drove to Portland to meet with Mr. Englert. He brought the jeans that Mr. Stenson wore on the night of the murders with him. It is undisputed that Sgt. Martin ultimately ended up trying on those pants, at Mr. Englert's direction, with the pants pockets turned inside-out, while Sgt. Martin's own hands were ungloved. FF:24; 3/17/10 VRP:32, 65. It is undisputed that Sgt. Martin then took "dabs" from those same pants pockets for gunshot residue ("GSR") testing on April 20, 1994, at his own home. FF:12; FF:25.

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[3] The only type of finding made by the Superior Court that is incorrect is one that is not about the evidence presented at the evidentiary hearing – it is that court's *legal* assessment about the importance of GSR evidence in the context of the entire trial. That, however, is a legal conclusion that this Court should review de novo in the context of full briefing on the substantive claims.

B. FBI Agent Peele Testified About GSR Testing of the Pants Without Revealing Who Did the Testing And How Many Particles Were Really Found

Agent Peele testified about the FBI Crime Lab's GSR testing of these pants pockets at trial and said they indicated presence in a shooting environment. He did not say anything about the bench notes from the FBI Crime Lab's GSR testing of those pants pockets at trial. Those notes, however, revealed that someone who had never been disclosed to trial counsel – analyst assistant Kathy Lundy – did the actual GSR testing, produced 41 pages of notes, and found no more than four (or two, per expert Ms. Arvizu) GSR particles in total. FF:22; FF:31.

C. Neither the Prosecutor Nor Any Other Member of the Prosecution Team Told the Defense About Ex. 4, The Photos Showing Sgt. Martin's Contamination of the Pants, or the Undisclosed Portion of Ex. 7, i.e., the Favorable FBI GSR Bench Notes, Although State Knew Both Existed

Neither Mr. Bruneau, Agent Peele, nor any other member of the prosecution team ever provided the defense trial lawyers or any member of the defense trial team with Ex. 7, pp. 222-263, the bench notes from the FBI Crime Lab's GSR testing of those pants pockets. FF:31; 3/9/10 VRP:157-58. Mr. Bruneau made no effort to obtain the FBI's GSR bench notes. 3/16/10 VRP:98, 173. Mr. Bruneau does not remember meeting with Agent Peele in Clallam County after Agent Peele flew out here from

Washington, D.C., to testify at the trial. 3/16/10 VRP:119, 172. Agent Peele believes he would have met with Mr. Bruneau before testifying, and would have brought all of the bench notes, including those contained in Ex. 7, with him to this pre-meeting. 3/11/10 VRP:151-52, 160-61, 163-64. Agent Peele also believes that he brought those documents with him to the witness stand when he testified. FF:26; 3/11/10 VRP:151-52, 160-61.

Mr. Bruneau, however, claimed that he did not remember being aware of the FBI bench notes contained in Ex. 7, pp. 222-263, or of the information they contained. 3/16/10 VRP:123, 151, 159. Still, he did know that there were bench notes concerning FBI GSR testing that had not been turned over to the defense. FF:33; 3/16/10 VRP:197.

Neither Mr. Bruneau, Agent Peele, nor any other member of the prosecution team ever told any member of the defense team that Kathy Lundy (rather than just Agent Peele) did GSR testing in this case. FF:33, 3/16/10 VRP:159. Neither Mr. Bruneau nor any other member of the prosecution team ever told any member of the defense team that Ms. Lundy's tests showed that there were only two particles of GSR, according to Ms. Arvizu, found in the "dab" taken from Mr. Stenson's right jeans' pocket. 3/8/10 VRP:93-95, 100-01.

Neither Mr. Bruneau nor any other member of the prosecution

team ever provided the defense with Ex. 4A, B, or C, the blowups of Ex. 68a-c, or with Ex. 68 itself – containing the photos of Sgt. Martin contaminating the pants. FF:44; 3/9/10 VRP:156-57. Neither Mr. Bruneau nor any other member of the prosecution team ever told the defense about the information revealed by those photographs, that is, that Sgt. Martin tried on the jeans that Mr. Stenson wore on the night of the murder, with the front pants pockets turned inside-out; that Sgt. Martin did so with ungloved hands; and that this occurred on April 14, 1994, less than one week before Sgt. Martin took the GSR "dabs" from those inside-out pockets on April 20, 1994. FF:45; 3/17/10 VRP:99-100.

D. Trial Counsel Exercised Due Diligence in Seeking Evidence About Stenson's Pants But Were Unable to Find the Photos and Bench Notes Because the State Failed to Disclose Them, Despite Court Orders Requiring Their Production

1. The Trial Court's Pre-Trial Discovery Orders Covered Favorable Evidence, Bench Notes, and all Lab Personnel; the State Gave the Court Assurances That They Would Comply With All Such Orders

On June 4, 1993, the Superior Court entered an Omnibus Order compelling the state to provide the defense with all evidence "favorable to the defense on the issue of guilt." Ex. 11, p. 2, ¶ 15. This Order referred to all favorable evidence, not just favorable evidence concerning DNA tests; in fact it was entered before the DNA motions were filed.

In that Omnibus Order, the Court ordered the state to provide the defense with the name of every expert witness and a copy of that witness's "report." Ex. 11, p. 2, ¶ 17. That disclosure order was not limited to DNA evidence. That Omnibus Order also ordered the state to provide the defense with "any reports of scientific tests ... pertaining to this case." Ex. 11, p. 2, ¶ 19. That disclosure order was not limited to DNA evidence, either.

Thereafter, on October 8, 1993, another discovery order – the Reciprocal Order – was entered. Ex. 10. This Order also covered the topic of discovery and this Order also covered more than just DNA evidence. The Reciprocal Order compelled the state to provide the defense with "reports, letters and conclusions prepared by or on behalf of lab or other forensic experts." Ex. 10, first page.

A hearing was then held four months later, on February 4, 1994, concerning discovery. At that hearing, Mr. Bruneau stated: "The first request is for FBI laboratory protocols. This I take to be a request for materials beyond the scope of simply DNA or the RFLP testing in this case and I object to that." Ex. 13A, p. 189. Mr. Bruneau thus knew that this defense request for discovery also involved more than just DNA or RFLP testing. Mr. Bruneau also stated at that hearing that, "I suppose more significantly, Your Honor, is the fact that I know that the FBI uses

standard laboratory techniques. The techniques used in firearm examination and trace evidence examination are standard laboratory techniques." Ex. 13A, p. 190. This confirms that Mr. Bruneau knew that the defense requests for discovery concerning scientific evidence involved more than just DNA evidence.

In fact, Mr. Bruneau assured the court and the defense on February 4, 1994, that he had provided and would continue to provide the defense with the names and phone numbers of each FBI analyst who performed "any" examinations or testing related to this case. He did so by stating: "Furthermore, I have provided the names of all of the individuals at the FBI Crime Laboratory who performed any testing in this case and I told counsel yesterday that I would provide them not only the names but the phone numbers of each of the agents who performed any examinations in this case." Ex. 13A, p. 190.

Mr. Bruneau also stated the following at the February 4, 1994, hearing, which confirms that he understood that the defense discovery requests and the state assurances applied to more than just DNA testing: "Insofar as the protocols apply to DNA ... not be a problem ... However, the other protocols applying to the rest of the FBI Crime Laboratory, that is, to the firearms examination, to the rest of the Crime Laboratory, ... [takes a different position regarding disclosure]." Ex. 13A, p. 194.

Following the February 4, 1994, hearing, the trial court entered an order compelling the state to disclose "lab bench notes generated by every laboratory analyst who tested evidence." Ex. 9, ¶ 2. In context, that portion of the Order applied to all "bench notes" of "every laboratory analyst" and not just to notes or analysts concerned with DNA. That same Order provided that the state must disclose information about "any lab personnel who handled any of the evidence or who performed tests" in this case. Ex. 9, ¶ 8. It also required disclosure of photographs. Ex. 9, ¶ 2.

2. Mr. Bruneau Testified that Examining FBI Lab Reports of GSR Without Seeking Backup Bench Notes Shows Reasonable Trial Lawyer Diligence

Mr. Bruneau was an extremely experienced prosecutor. He has been a prosecutor for 33 years, in three different counties. 3/16/10 VRP:95. He was the elected prosecutor in Clallam County during Mr. Stenson's trial. *Id.* Before Mr. Stenson's case, Mr. Bruneau had handled approximately 6 to 12 cases involving GSR tests. 3/16/10 VRP:105. Mr. Bruneau wanted to ensure that the *Stenson* case was investigated and prosecuted as diligently as possible. 3/16/10 VRP:131.

Mr. Bruneau did not request the bench notes from Agent Peele's GSR tests. He depended on the report provided to him by the FBI to provide all the relevant information, and he did not seek out any more information from the FBI. 3/16/10 VRP:98, 141-42 ("I'm not going to ask

a crime laboratory to give me more. All they can give me is what their analysis is. I would never do that."). Mr. Bruneau believed that it would be an extraordinary act to request such bench notes for GSR testing; it would not, however, be extraordinary to request them for DNA given the unique issues presented by the DNA testing at the time of Mr. Stenson's case. 3/16/10 VRP:97-98.

Mr. Bruneau thus believed that diligent lawyering required reviewing the FBI GSR results, but not any background bench notes.

3. Both Sgt. Martin and Mr. Bruneau Knew What Had Occurred on April 14, 1994, and Neither One – Nor Any Other Member of the Prosecution Team – *Disclosed this to the Defense*

Mr. Bruneau and Sgt. Martin worked closely together on the *Stenson* case. They frequently discussed the investigation and trial preparation. 3/16/10 VRP:173-74. Sgt. Martin did not withhold information concerning the case from Mr. Bruneau; Sgt. Martin was candid with Mr. Bruneau about the *Stenson* case. 3/16/10 VRP:174-75.

Mr. Bruneau knew that Sgt. Martin met with their then-retained expert Mr. Englert on April 14, 1994. 3/16/10 VRP:111, 176. Mr. Bruneau was interested in what occurred at that meeting. The meeting had to do with the case, and the County was spending a lot of money on Mr. Englert. 3/16/10 VRP:176.

Mr. Bruneau learned that Sgt. Martin tried on the pants. 3/16/10 VRP:177. He had never before been involved in a case where a detective tried on the suspect's pants. *Id.* He was not expecting that to happen when the detective went to see Mr. Englert. *Id.*

This was a memorable moment because he was so surprised. He was extremely angry with Sgt. Martin when he found out, and he expressed that anger directly and forcefully to Sgt. Martin. Sgt. Martin joked that he still had the "teeth marks" to prove it. 3/16/10 VRP:178; 3/17/10 VRP:32-33.

At that time, law enforcement personnel across the country were commonly wearing gloves and taking other precautions to prevent contamination of evidence. This was established by the testimony of Ms. Arvizu. 3/11/10 VRP:76-77. It was confirmed by Mr. Englert, who testified that the O.J. Simpson trial which was televised around this time made clear that the failure to use such precautions was considered a major problem even during the 1990's. 3/10/10 VRP:99-100. It was also confirmed by the testimony of Sgt. Martin, who acknowledged that he was shocked to see a photograph of himself handling evidence in 1994 without gloves. 3/17/10 VRP:27. Additionally, it was confirmed by Ex. 98, Sgt. Martin's affidavit of January 8, 2009, stating that at the time of the *Stenson* trial he *did* wear gloves for evidence collection.

Sgt. Martin spoke to Mr. Walker, the defense investigator, around May 24-25, 1994. 3/17/10 VRP:68. Sgt. Martin did not tell Mr. Walker that he had tried on the pants. *Id.* Sgt. Martin had frequent contact with members of the defense team. At no time did he indicate to any of them that the *Stenson* pants were handled in any but the most proper manner. 3/17/10 VRP:99-100.

At the evidentiary hearing on March 17, 2010, Sgt. Martin revealed that when he drove to Portland to visit Mr. Englert in April of 1994, he would have carried the *Stenson* jeans in the trunk of his car. 3/17/10 VRP:31. He further testified that if he had taken his patrol car – as he might have done – that those pants would have been in the trunk with Sgt. Martin's sidearm, his M-16, and his Remington shotgun. 3/17/10 VRP:30-31. This was the first time that Sgt. Martin ever revealed this additional potential source of contamination of the pants.

E. The State Used GSR Results Against Stenson at Trial Even Though They Knew That They Were Likely Contaminated

At trial, Mr. Bruneau offered the jeans and a variety of evidence taken from those jeans into evidence; he then argued that the jeans were not contaminated. Trial VRP:1777-79. Sgt. Martin sat next to Mr. Bruneau at counsel table throughout the Stenson trial. 3/17/10 VRP:83; FF:14. Neither Sgt. Martin nor Mr. Bruneau ever corrected any of the

testimony elicited by the state from witnesses who stated that the pants were not contaminated or had not been tried on.

Even as late as January 8, 2009, Sgt. Martin swore under oath that he was wearing gloves at the time that he tried on the *Stenson* jeans in 1994. Ex. 98.

F. <u>The Defense Exercised Reasonable and Due Diligence with Sgt. Martin; Martin Would not have Told Them the Truth About Whether He was Wearing Gloves No Matter How Often They Asked</u>

If any member of the defense team had asked Sgt. Martin, at any time before 2009, if he wore gloves when he tried on the Stenson jeans in 1994, Sgt. Martin would have answered "yes." 3/17/10 VRP:96-97.

G. <u>The Defense Team Exercised Reasonable and Due Diligence with State Witness Rod Englert; He Refused to give the Defense His Full File and He Discussed Only Blood Spatter Matters With Defense Investigator Jeff Walker</u>

Defense trial investigator Jeff Walker interviewed both Rod Englert and Agent Peele. Walker interviewed Englert on June 7, 1994. Ex. 15, 16; 3/10/10 VRP:48. This was after the Englert-Martin meeting of April 14, 1994, but before any GSR test results from the pants pockets were given to the defense on June 20, 1994. Walker and Englert were alone; no representative of the state attended this interview even though Englert called Sgt. Martin and confirmed that Martin had no objection to

the interview occurring. 3/10/10 VRP:80-81.

Mr. Englert's field is primarily blood spatter and reconstruction. Englert had not been hired for any purpose other than blood spatter analysis; the topic of his interview with Mr. Walker was limited to blood spatter. 3/10/10 VRP:50, 69. Walker did not ask Englert questions about any topic other than this. 3/10/10 VRP:50. Englert had his file at this interview. 3/10/10 VRP:51, 76. Walker asked for a copy of the file. 3/10/10 VRP:54. Mr. Englert refused to give the file or any of its contents to Walker either during or after this interview. *Id.* Englert refused to give Walker the file because Mr. Bruneau had instructed Mr. Englert not to give the defense any portion of that file. *Id.* Englert did not give Walker any photographs from the file, either. *Id.*

Englert does not remember which photographs he may have shown to Walker during that meeting. 3/10/10/ VRP:51-52. Walker does not remember which photographs Englert may have shown to him during that meeting. 3/10/10 VRP:19-24.

Walker, however, wrote two reports of those meetings, Ex. 15 and 16, for the lead defense trial lawyer who had hired him, Fred Leatherman. The latter report, Ex. 16, was the more detailed one. Walker testified that he wrote reports to contain sufficient detail to enable the lead defense trial lawyer to understand every aspect of the interview. 3/8/10 TR:132-34.

That more detailed report, Ex. 16, described the photographs that Walker was shown in sufficient detail for Mr. Leatherman to understand what the photos contained. 3/8/10 VRP:132-35. That more detailed report, Ex. 16, shows that Mr. Walker saw only photographs of the pants legs relating to blood spatter. *Id.*

These documents therefore support the inference that Englert did not tell Walker the information contained in Ex. 4A, 4B and 4C – that is, that Sgt. Martin wore the *Stenson* jeans with the pockets turned out and with ungloved hands on April 14, 1994 – at that meeting or at any other time. Yet at the time of this June 7, 1994, meeting with Walker, Englert was clearly still a member of the prosecution team: he still believed that he would be a witness for the state in the Stenson case. 3/10/10 VRP:55. It was not until June 8, 1994, that Mr. Englert learned that he would not be a witness in the state's case in chief, though at that time he was still told that he might be needed for rebuttal. Ex. 73 (Oct. 1994 letter).

H. Factual Conclusions with Regard to Defense Trial Counsel's Diligence

After hearing testimony concerning defense efforts to obtain evidence, the prosecution's failure to disclose evidence, and the trial prosecutor's own opinion about what constitutes diligent preparation for the GSR testimony, Judge Williams concluded that defense trial counsel

exercised reasonable and due diligence in their preparation for the *Stenson* trial. FF:33, 46, 55. Defense trial counsel exercised reasonable and due diligence in their investigation of Mr. Englert. FF:46, 55. Defense trial counsel exercised reasonable and due diligence in their investigation of Sgt. Martin's conduct in this case, including his handling of the *Stenson* pants. *Id.* Defense trial counsel exercised reasonable and due diligence in investigating the forensic evidence in this case, including their investigation of Agent Peele, the GSR results, the handling of the *Stenson* pants, and the trustworthiness of the GSR evidence. *Id.*, FF:33.

I. Factual Conclusion with Regard to Prosecutor's Failure to Discharge his Duty to Disclose Favorable Evidence

Neither Mr. Bruneau nor any other member of the prosecution team told any member of the defense team about Ex. 4 or Ex. 68, memorializing Sgt. Martin's contamination of the pants, or Ex. 7, pp. 222-263, the favorable FBI bench notes. FF:45; 3/8/10 VRP:93-95, 100-01. This also supports the factual conclusions that the evidence was not disclosed and defense counsel were diligent.

J. Factual Conclusion with Regard to Prosecutor's Elicitation of Evidence of Guilt that He Knew was Untrue, Yet Failed to Correct

Mr. Bruneau never saw Ex. 7, pp. 222-263, the bench notes, until two hours before the reference hearing in March, 2010. 3/16/10 TR:122-

23. At the time of Mr. Stenson's trial, Mr. Bruneau believed that GSR results have "always been somewhat ambiguous. ... they're not going to say Mr. X fired a gun. They're not going to do that, and I've never seen that." 3/16/10 VRP:142.

Mr. Bruneau received GSR results from Agent Peele on June 20, 1994. That was the first time he learned of the GSR result from Q85, the right front pocket of the *Stenson* jeans. FF:25. The defense trial lawyers learned about those GSR results for the first time on the same day. *Id.* The trial was already in progress on that date; jury selection was well underway and the presentation of evidence was soon to begin. *Id.*

Mr. Bruneau offered that evidence at trial after receiving those results. Mr. Bruneau elicited testimony from Agent Peele that this result was consistent with Mr. Stenson being in a shooting environment. Trial VRP:1089-90. At trial, in closing rebuttal argument, Mr. Bruneau argued that defense counsel's closing argument contention that the GSR was from contamination, instead, was "an invitation to the rankest form[] of speculation. Or imagination." Trial VRP:1778, Ex. 90.

Mr. Bruneau further argued in rebuttal closing:

> One of those, just to give you an example: Mr. Neupert talks about well, perhaps imagine, maybe the defendant picked up that gunshot residue that was found in his right pocket from Deputy Fuchser's car. Or maybe he got it because J.R. Williamson at the FBI crime lab once

handled this piece of evidence.

> Well, first of all. I think you know from observing the FBI personnel who testified here that they know how to handle evidence and I think you know now that Sergeant Turner's concerns about the defendant being in Fuchser's car were unfounded. ... Because Roger Peele told you that in order to get the gunshot residue, you have got to be in a shooting environment. That's the bottom line. You have got to have your hands in a shooting environment.
>
> ...
>
> There's no shooting environment in Deputy Fuchser's car. There's no shooting environment at the FBI Crime Laboratory. Counsel is asking you to imagine something.

Trial VRP:1778-79, Ex. 90. The state now argues the opposite position – that there was a "shooting environment" in "Deputy Fuchser's car" or "the FBI crime lab." Response, p. 4.

K. <u>The State Had an "Open File" Policy</u>

Sgt. Martin opened up his file to defense investigator Jeff Walker. Walker reviewed the evidence on May 24-25, 1994. 3/17/10 TR:39-40. Sgt. Martin maintained an open file policy for the defense – he would show them "whatever was there." 3/17/10 VRP:40 (direct), 58 (cross). As a legal matter, the defense is entitled to rely on the state's representation that it had an "open file policy" to assume that the state was disclosing all exculpatory evidence, *Strickler v. Greene,* 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 268 (1989); hence, the defense did not have any

reason to expect that Sgt. Martin would withhold any evidence from them.

L. PRP Counsel Exercised Reasonable and Due Diligence

PRP counsel reviewed the transcript of the trial, including the testimony of Agent Peele concerning the existence of GSR on the right pocket of the jeans that Mr. Stenson wore on the night of the murders. 3/10/10 VRP:121-22, 131. Because Mr. Peele was an expert, a Special Agent with the FBI, with experience, who stated that the GSR tests were his own, PRP counsel never sought to obtain GSR testing materials from anyone else. PRP counsel did not know that such additional notes existed, or that they might contain favorable evidence. 3/10/10 VRP:132.

The PRP team noted that the GSR test results were qualitative, not quantitative. That did not highlight the need for further investigation in part because the defense trial interview with Agent Peele revealed that Peele stated that only the qualitative results were important. 3/10/10 VRP:133-34, 220-21.

PRP counsel reviewed reports from defense trial investigator Mr. Walker concerning his interview of Rod Englert. Ex. 15, 16; 3/10/10 VRP:134-35. PRP counsel did conduct follow up concerning issues triggered by the defense trial interview with Mr. Englert, Ex. 15. 3/10/10 VRP:135. PRP counsel did not follow up on the photographs mentioned

in the first defense interview of Mr. Englert, Ex. 15, because a fuller description of those photographs appears in the later and more complete summary of that interview, Ex. 16, and this revealed that the photos concerned blood spatter rather than GSR. Ex. 16, ¶ 23; 3/10/10 VRP:135-36. PRP counsel did, however, follow up on the blood spatter issues by contacting expert Mr. Sweeney. 3/10/10 VRP:121, 130.

PRP counsel had never heard the name Kathy Lundy; they did not know that she did any of the testing in this case. 3/10/10 VRP:139. PRP counsel were experienced lawyers but they were not GSR experts. They did not know that there should have been scores of pages of backup material to accompany a GSR report. 3/10/10 VRP:217. PRP counsel did not know that the materials in Ex. 7 – specifically, the Lundy bench notes at pp. 222-263 – existed at the time they represented Mr. Stenson. 3/10/10 VRP:215-16. The first time that PRP counsel Mr. Ness saw those materials was at the beginning of February, 2010, when Mr. Gombiner and Ms. McCloud showed them to Mr. Ness. 3/10/10 VRP:139.

PRP counsel did not know that Det. Martin tried on Mr. Stenson's jeans, with ungloved hands, and with the pants pockets turned inside out, on April 14, 1994, six days before Sgt. Martin took the GSR "dabs" from those pockets on April 20, 1994. 3/10/10 VRP:137-38. PRP counsel did not know that there was a photograph of that ungloved contamination

incident, either. 3/10/10 VRP:137. The first time that PRP counsel saw Ex. 4A, 4B, and 4C was in February of 2010. 3/10/10 VRP:137-38. The first time that PRP counsel learned the critical facts shown by Ex. 4A, 4B and 4C – *i.e.*, that Sgt. Martin wore the *Stenson* jeans with the pockets turned out and with ungloved hands one week before Det. Martin took GSR "dabs" for testing from those pockets – was on the same date, that is, in February of 2010. *Id.*

This all shows that PRP counsel exercised reasonable and due diligence in their representation of Mr. Stenson. FF:33, 46, 55. PRP counsel exercised reasonable and due diligence in their investigation of the handling of the *Stenson* pants, including their investigation of forensic evidence including GSR from those pants. FF:33, 46, 55.

M. Mr. Stenson Exercised Reasonable and Due Diligence in Discovering Ex. 4, the Photos, and Ex. 7, the Bench Notes, and in Filing His Own PRP

There are no lawyers representing Mr. Stenson at the prison in Walla Walla. The person in charge of the law library at Walla Walla is not a lawyer and is not a law librarian by training. 3/17/10 VRP:128, 168. Mr. Stenson is not a GSR expert; Mr. Stenson does not know what a GSR report should look like. 3/15/10 VRP:184-85. Ex. 4, the photos, was not available to Mr. Stenson anywhere at Walla Walla. 3/17/10 VRP:171; 3/18/10 VRP:80-81. Ex. 68, more photos, was not available to Mr.

Stenson anywhere at Walla Walla. *Id.*

The first time Mr. Stenson heard about these photographs was in January of 2009, when investigator Jennifer Davis told Stenson about them. 3/15/10 VRP:185-86. This was the first time that Mr. Stenson learned that Sgt. Martin did the GSR kit on the jeans' pockets six days after he wore those pants with ungloved hands and with the pockets turned out. *Id.* The first time Mr. Stenson saw the photographs in Ex. 4 was on February 9, 2009. 3/15/10 VRP:185.

Ex. 7, the bench notes, was not available to Mr. Stenson anywhere at Walla Walla, either. 3/17/10 VRP:171; 3/18/10 VRP:80-81. The first time that Mr. Stenson heard about Ex. 7, pages 222-263, was sometime after May 21, 2009. FF:21; 3/15/10 VRP:187-88. That was the first time that Mr. Stenson learned about the existence of a Kathy Lundy, who had actually done the GSR tests, or about her quantitative results. *Id.* The first time that Mr. Stenson saw those documents was even later.

Mr. Stenson believed that the state was under court orders to disclose all favorable evidence to his lawyers. 3/15/10 VRP:189-90. Still, Mr. Stenson wrote his own letter to Mr. Englert, after the trial, in October of 1994 (Ex. 68) asking him for help in finding any exculpatory material that Mr. Englert might know about. 3/15/10 VRP:190-91. Mr. Stenson never received an answer. 3/15/10 VRP:191.

He mailed his *pro se* PRP in to this Court on May 13, 2009.

Mr. Stenson began having symptoms consistent with a heart attack in January of 2009. On June 10, 2009, he had heart surgery for at least one prior heart attack. 3/15/10 VRP:186.

N. Habeas Corpus Counsel Exercised Reasonable and Due Diligence

1. Habeas Counsel Exercised Reasonable and Due Diligence in Their Habeas and Post-Habeas *Investigations and Filings*

Judge Williams ruled that habeas counsel exercised reasonable and due diligence in their investigation, preparation, and filing of the habeas corpus petition. FF:46, 55. He also ruled that habeas counsel exercised reasonable and due diligence in their post-habeas investigations and filings, including their investigation of issues concerning forensic evidence from the *Stenson* pants. FF:46, 55, 56.

2. Habeas Counsel Exercised Reasonable and Due Diligence in Finally Discovering Ex. 4 and Ex. 7

This is fully supported by the evidence. On November 21, 2008, the Friday before Thanksgiving, the Superior Court denied the defendant's motion to compel DNA testing which had been pending since August of 2008. 3/15/10 VRP:17. At that point, Mr. Stenson's execution date was set for December 3, 2008. *Id.* That same day, Robert Shinn walked into his probation officer's office in Clallam County and stated that he had

information about the murders that Stenson was convicted of committing. 3/15/10 VRP:18.

Mr. Shinn said that at least eight years earlier, another person had revealed to him the identities of several individuals who had actually plotted and carried out the murders of Frank Hoerner and Denise Stenson. 3/15/10 VRP:18. Mr. Shinn then gave this information to Prosecutor Ms. Kelly. *Id.* Ms. Kelly recorded the interview and contacted defense counsel on that same day. 3/15/10 VRP:18-19.

This new and unexpected development caused a whirlwind of new investigation by the defense as well as the prosecution. Ultimately, based on the new evidence and new investigation, the Superior Court reconsidered its order denying DNA testing and based on the new Shinn evidence, granted DNA testing instead. 3/15/10 VRP:19-20. This occurred on Tuesday, Nov. 25, 2008. *Id.*

On November 26, 2008, at 5:36 p.m., the Wednesday evening before Thanksgiving, Prosecuting Attorney Ms. Kelly faxed a letter to defense counsel stating, "As I worked last night I read for the first time" trial transcripts of Agent Peele's testimony concerning lead bullet analysis. Ex. 94. The letter continued that Ms. Kelly had faxed the transcript of the Peele testimony to the FBI to review his lead bullet analysis testimony. *Id. See also* FF:19; 3/15/10 VRP:22-26.

On December 2, 2008, Ms. Kelly received a letter and then faxed it to the defense on December 3, 2008. Ex. 95. *See also* FF:19; 3/15/10 VRP:27-30. That letter was from the FBI to Ms. Kelly. *Id.* In paragraph 2, the letter stated that the FBI could no longer stand behind Agent Peele's testimony. *Id.* The letter was limited to his testimony about lead bullet analysis. *Id.*

On January 15, 2009, Ms. McCloud sent an email to Ms. Kelly seeking assistance in obtaining the entire FBI file on the *Stenson* case. FF:21; 3/15/10 VRP:32-33. The reason for this request was that the FBI had told the defense that the files were in storage and would be hard to get, but that it would be easier to get the files if the agency that originally requested the testing asked for the files directly. *Id.*

On February 1, 2009, Ms. McCloud sent an email to Ms. Kelly thanking her for agreeing to get the FBI file and attaching a proposed letter to be sent to the FBI to make the request. 3/15/10 VRP:33-34. On March 18, 2009, two months later, Sgt. Martin sent a final of the proposed draft letter to the FBI requesting that file. Ex. 7, pp. 3, 4. *See also* FF:21; 3/15/10 VRP:35. On May 15, 2009, two additional months later, the FBI sent its file – that is, the materials including bench notes contained in Ex. 7 – to Det. Martin. Ex. 7, p. 2. *See also* FF:21; 3/15/10 VRP:36. On May 21, 2009, Sgt. Martin sent Ex. 7 to the defense. Ex. 7, p. 1. *See also*

FF:21; 3/15/10 VRP:36-37.

A defense review of this file revealed that the FBI had sent a letter to the Sheriff of Clallam County much earlier, alerting him to the problem with the lead bullet analysis problem on April 10, 2008, and asking for a response within 30 days of that April 10, 2008, date. Ex. 7, pp. 5, 6. *See also* 3/15/10 VRP:37-39. That file contains no timely response from the Sheriff or the Prosecutor.

These 2008-2009 disclosures about issues with the scientific evidence presented at trial did cause the defense team to re-interview Agent Peele and other witnesses who had testified or offered opinions concerning not just lead bullet analysis but also other scientific evidence in the *Stenson* trial, including: Mr. James, Mr. Grubb, Mr. Sweeney, and Mr. Englert. FF:20; 3/15/10 VRP:40-41. The state opposed attempts by the defense team to contact Mr. Englert. 3/15/10 VRP:42. *See also* State's Supplemental Memorandum Regarding Propriety of Further DNA Testing, *Superior Court* Dkt. 497, p.4, n.1.

On January 7, 2009, a defense investigator met with Mr. Englert and accompanied him to a facility to obtain his closed *Stenson* file; the investigator did obtain a copy of Mr. Englert's file from him. FF:20; 3/15/10 VRP:42-44. The photographs were contained in Ex. 68, which was the entire Englert file. FF:7; 3/15/10 VRP:43. The photos in that

exhibit show Sgt. Martin wearing the *Stenson* jeans on April 14, 1994, with the pockets turned out and no gloves on his hands. *Id.*

On January 8, 2009, one day later, Sgt. Martin signed a declaration stating that he *wore* gloves when he touched those *Stenson* jeans on April 14, 1994. Ex. 98, p. 3, line 5. Sgt. Martin did not know that the defense had obtained the photographs of him using ungloved hands just a day earlier. 3/17/10 VRP:97-98.

On July 16, 2009, after learning that the defense had obtained the photographs in Ex. 68 and Ex. 4, Sgt. Martin submitted another declaration. In this newer one, he acknowledged that he was the person pictured in those exhibits and that he was not wearing gloves while wearing the *Stenson* jeans. Ex. 99.

Habeas corpus counsel exercised reasonable and due diligence in their representation of Mr. Stenson. FF:46, 55, 56.

O. The Information Contained in Ex. 4, the Photos, and Ex. 7, the Bench Notes, is Material to the Outcome of the Trial

In the defense closing, Mr. Neupert argued that the evidence that Mr. Stenson had been in a shooting environment should not be considered because the GSR results could have been contaminated from the back of the patrol car or the FBI laboratory. Trial VRP:1751-53. In the state's rebuttal closing, Mr. Bruneau ridiculed the defense contention that the

GSR results could have been contaminated and stated, instead, that the GSR results were uncontaminated, trustworthy, and inculpatory. Trial VRP:1777-79.

There are three principal areas to look at to determine the reliability of the GSR test conclusions and indeed to determine the reliability of any scientific test conclusions: sample integrity, scientific method validity, and whether the method is reliably executed. 3/11/10 VRP:17. Given the new evidence of contamination by Sgt. Martin trying on the pants with ungloved hands and inside-out pockets, sample integrity cannot be assured. FF:35; 3/11/10 VRP:70. This alone undermines the validity of the GSR testing and conclusions. *Id.*

Given the new and uncontroverted evidence that the FBI Crime Lab where the testing was done – the Hoover Building – had a shooting range in the building and an HVAC system capable of distributing GSR throughout the building, sample integrity cannot be assured. 3/11/10 VRP:61-64. This alone undermines the validity of the GSR testing and conclusions. *Id.*

Given the new and uncontroverted evidence of the absence of baseline control studies comparing the presence of GSR on clothing with background GSR in order to determine what number of particles can be considered forensically material; and given the absence of agreement in

the scientific community about a standard for the number of particles necessary for scientific materiality; it is also impossible to assure that the method used was scientifically valid. 3/11/10 VRP:33-34, 40. This alone undermines the validity of the GSR testing and conclusions. *Id.*

Given the new information in Ex 7., pp. 222-263, showing that there are less than four, and more probably than not only two, verifiable particles of GSR that are identified from sample Q85, it is also impossible to assure that the method was reliably executed. FF:15; 3/11/10 VRP:58-59, 65. This alone undermines the validity of the GSR testing and conclusions. *Id.*

Given the new information in Ex. 7, pp. 222-263, showing that the agent who analyzed the results and testified at trial was not the person who did the actual testing; and given the problems with the bench notes of the analyst who actually performed those tests, it is impossible to independently verify whether the reported results are valid and reliable. The natural inference from expert Ms. Arvizu's testimony is that this would also undermine the validity of the GSR testing and conclusions. 3/11/10 VRP:58-59.[4]

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[4] *See also* 3/11/10 TR:34 ("So everything that is relevant to performance of the test has to be documented contemporaneously."); 3/11/10 TR:72-73 (Lundy's notes incomplete – no contemporaneous notes); 3/11/10 TR:55 ("...again, I have to assume because she [Lundy] documented her work so

One cannot have a GSR result to a reasonable degree of scientific certainty without knowing the number of GSR particles that were confirmed. 3/11/10 VRP:64. One cannot have a GSR result to a reasonable degree of scientific certainty without seeing the bench notes of the analyst, to verify her work. 3/11/10 VRP:64-65. One cannot have a GSR result to a reasonable degree of scientific certainty without knowing about contamination of the sample. 3/11/10 VRP:65.

Taken together, these factors certainly show that the GSR testing and conclusions were neither valid nor reliable. FF:17. The state's failure to provide this information to defense trial counsel had both direct and indirect impacts on the trial. The trial court would not have admitted the GSR evidence at trial if it had been aware of these factors. FF:35, 36 ("The fact that GSR was found in Mr. Stenson's right front pants pocket would not be admitted as evidence against him if the matter were tried today."). Defense counsel even testified that, had he known this information, it would have ameliorated some of the conflict between himself and Mr. Stenson: "...if I had known this and pursued this, I don't think Mr. Stenson and I would have had as much of a struggle with each other as we did. ..." 3/8/10 VRP:138.

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poorly ...")

III. CONCLUSION

Mr. Stenson has satisfied the prerequisites to a stay of execution under RAP 16.24 and 8.1(b), as well as the rule of equitable tolling. The trial court's Findings supporting Mr. Stenson's entitlement to such a stay – that he has discovered important new evidence and that he (and his lawyers) exercised diligence in obtaining it – are fully supported by the record. Mr. Stenson does not need to prove that he will ultimately win on his substantive claims, also, to be able to remain alive to litigate those substantive claims. Such a rule would contradict RAP 16.24's and RAP 8.1(b)'s preliminary gate-keeping function; would contradict RAP 1.2's mandate that the Rules be interpreted in favor of achieving decisions on the merits; and would flout common sense. The motion for stay of execution should therefore be granted.

DATED this 28th day of May, 2010.

Respectfully submitted,

Sheryl Gordon McCloud, WSBA No. 16709
Counsel for Petitioner, Darold R.J. Stenson

Robert Gombiner by SGM

Robert Gombiner, WSBA No. 16059
Counsel for Petitioner, Darold R.J. Stenson

Peter Avenia by SGM

Peter Avenia, WSBA No. 20794
Counsel for Petitioner, Darold R.J. Stenson

CERTIFICATE OF SERVICE

I certify that on the 28th day of May, 2010, a true and correct copy of the foregoing was served upon the following individuals via email:

Pamela B. Loginsky
pamloginsky@waprosecutors.org

Deborah Kelly
dkelly@co.clallam.wa.us

I further certify that on the 28th day of May, 2010, a true and correct copy of the foregoing was served upon the following individual by depositing same in the U.S. Mail, first-class, postage prepaid:

Darold R. J. Stenson, #232018
WSP, Unit IMU, D4
1313 North 13th Avenue
Walla Walla, WA 99362-1064

Sheryl Gordon McCloud

EXHIBIT A

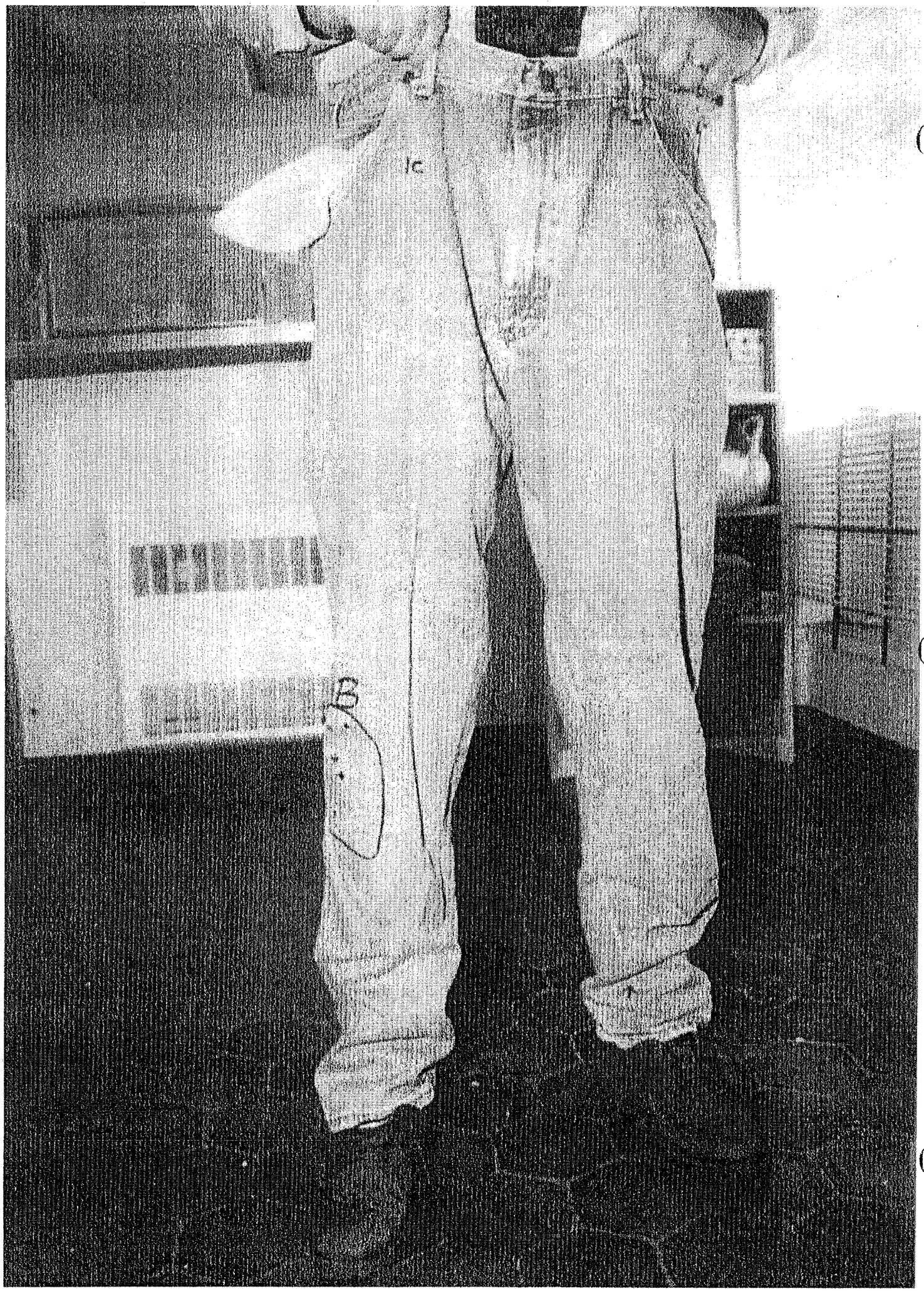

EXHIBIT B

3-17-09

DECLARATION OF KAY SWEENEY

I, Kay Sweeney, do hereby declare:

1. I currently work as a forensic scientist providing laboratory analysis of physical evidence and consulting services to a variety of clients. I have worked as a forensic scientist for over forty years. I have testified as an expert witness in the areas of firearms examinations, blood analysis, trace evidence analysis, crime scene investigation, blood spatter interpretation, and event reconstruction in the courts of Washington, Oregon, Montana, Idaho, Indiana and Alaska.

2. I have been asked by the attorneys for Mr. Darold Stenson to examine a pair of jeans, Exhibit #123, which was introduced into evidence at Mr. Stenson's 1994 trial.

3. On April 6th, 1999, I viewed Exhibit #123 at the Washington Supreme Court at the request of Mr. Stenson's prior attorneys, Ron Ness and Judy Mandel. Prior to this viewing, I was provided with records and photographs by Mr. Ness and Ms. Mandel. I have been provided with additional records regarding the jeans by the Federal Defender's Office and with records and photographs from the file of Mr. Rod Englert, a criminal investigation consultant who examined the jeans prior to Mr. Stenson's trial..

4. When I viewed the jeans on April 6, 1991, I observed that portions of the jeans had been cut out including apparent blood spots on the right knee and one spot on the lower front left leg near the cuff. I was not able to examine the cutouts themselves because they were not contained in Exhibit #123 and were never made available to me.

5. Based on all of the evidence I have reviewed, including photographs of the jeans, it is

my professional opinion that the three small elongated spots which can be observed on the front of the lower left leg, near the cuff portion of the jeans are not the result of blood spatter related to firearm discharge. If these elongated spots were gunshot induced blood spatter, there would be many more spot deposits and they would exhibit more of a fan, or cone shaped pattern. It is my opinion that the spots near the left cuff are the result of contact transference, such as the pants brushing against or blotting previously deposited blood, rather than spatter. This process obviously occurred relative to the apparent blood spot pattern on the right knee. Most of those spot deposits are fairly concentrated and yet after luminol treatment an additional set of more faint deposits were rendered visible in a mirror image pattern next to the original spot deposits, indicating that the pants were folded over in a manner that allowed for blotting transfer of the original spot deposits on the knee to adjacent fabric.

6. In order for me to analyze the manner in which blood on the right knee was deposited on the pants, it would be necessary to view both the pants and the cutouts from the pants.

I declare under the penalty of perjury under the laws of Washington and the United States of America that I have read the foregoing declaration, it is based upon personal knowledge, and it is true and correct.

Executed this 17th day of March, 2009 in Kirkland, Washington.

Kay Sweeney

OFFICE RECEPTIONIST, CLERK

To: Barbara Hughes
Cc: johns@atg.wa.gov; dkelly@co.clallam.wa.us; pamloginsky@waprosecutors.org
Subject: RE: DAROLD STENSON - CASE # 83606-0

Rec. 3-2-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Barbara Hughes [mailto:Barbara_Hughes@fd.org]
Sent: Wednesday, March 02, 2011 4:47 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: johns@atg.wa.gov; dkelly@co.clallam.wa.us; pamloginsky@waprosecutors.org
Subject: DAROLD STENSON - CASE # 83606-0
Importance: High

Attached above for filing with the Court is Petitioner Darold Stenson's Brief Addressing the Reference Court's Findings of Jan. 20, 2011, and noted exhibits. Thank you.